

Amend 2 Cal. Code Regs. section 18361 as follows:

§ 18361. Enforcement Proceedings.

(a) The staff, under the direction of the Executive Director, shall seek to assure voluntary compliance with the Political Reform Act and shall investigate possible violations of the Act. The staff shall make reasonable efforts to obtain information on a voluntary basis prior to the issuance of an administrative subpoena. The Executive Director, in the exercise of his or her discretion, may forego this procedure with respect to an investigation in progress. The staff shall periodically report to the members of the Commission on the status of all investigations, including the reasons for the issuance of any administrative subpoena without first making reasonable efforts to obtain the information voluntarily. Failure to report to the Commission concerning the issuance of subpoenas shall not affect the validity of any administrative subpoena.

(b) Memorandum Respecting Civil Litigation. If the Executive Director concludes that the initiation of civil litigation should be considered, he or she shall submit to the Commission a written memorandum which summarizes the facts and the applicable law of the case and, if appropriate, recommends the initiation of a lawsuit. Included in the memorandum shall be any exculpatory and mitigating information known to the staff.

The Commission shall review the memorandum at an executive session. No member of the staff shall be present unless the Commission concludes that the initiation of probable cause proceedings pursuant to Government Code ~~Section~~ section 83116 shall not occur. If the Commission wishes the staff to answer questions, it may meet with the staff in executive session for that limited purpose but shall not resume its deliberations until the staff is no longer present.

Any communication between the Commission and the staff during the executive session shall be transcribed. After review of the memorandum, the Commission may direct the Executive Director to do any of the following:

- (1) Initiate civil litigation;
- (2) Decide whether probable cause proceedings should be commenced pursuant to ~~subsection~~ subdivision (d) of this regulation;
- (3) Return the matter to the staff for further investigation;
- (4) Take no further action on the matter, unless the Executive Director indicates that further investigation would be appropriate; or
- (5) Take whatever other action it deems appropriate.

If the Executive Director deems it necessary, he or she may call a special meeting of the Commission to review a staff memorandum recommending the initiation of civil litigation.

It is the intent of the Commission in adopting this ~~subsection~~ subdivision to preserve for the members of the Commission the authority to decide whether alleged violations should be adjudicated in administrative hearings or in civil litigation, while at the same time avoiding the possibility that discussions with the staff might cause members of the Commission to prejudge a case that might be heard by the Commission under Government Code ~~Section~~ section 83116.

(c) Referral of Questions of Law to the Commission. If the Executive Director or any Commissioner believes that an enforcement decision should not be made until a question of law involving an interpretation of the Political Reform Act is resolved, the Executive Director or any Commissioner may submit the question to the entire Commission. The Commission shall consider the question in general terms at a regular public session. Prior to resolving the question

1 of law, the Commission or the Executive Director may request the staff or any other interested
2 party to submit a legal analysis of the question of law.

3 (d) Probable Cause Proceedings.

4 (1) Probable Cause Report. If the Chief of the Enforcement Division decides that
5 probable cause proceedings should be commenced pursuant to Government Code ~~Sections~~
6 sections 83115.5 and 83116, he or she shall direct the Enforcement staff to prepare a written
7 report, hereafter referred to as "the probable cause report." The probable cause report shall
8 contain a summary of the law and evidence gathered in connection with the investigation,
9 including any exculpatory and mitigating information of which the staff has knowledge and any
10 other relevant material and arguments. The evidence recited in the probable cause report may
11 include hearsay, including declarations of investigators or others relating the statements of
12 witnesses or concerning the examination of physical evidence.

13 At least 21 days prior to any determination of probable cause, all proposed respondents
14 shall be provided with the following, by service of process, or registered or certified mail with
15 return receipt requested:

16 (A) A copy of the probable cause report;

17 (B) Notification that the proposed respondents have the right to respond in writing to the
18 probable cause report and to request a probable cause conference at which the proposed
19 respondent may be present in person and represented by counsel, and;

20 (C) If the Commission met in executive session on this matter pursuant to ~~subsection~~
21 subdivision (b) of this regulation, a copy of any staff memoranda submitted to the Commission
22 at that time along with the transcript of any discussion between the Commission and the staff at

1 the executive session.

2 (2) Response to Probable Cause Report. Each proposed respondent may submit a
3 written response to the probable cause report. The response may contain a summary of evidence,
4 legal arguments, and any mitigating or exculpatory information.

5 Each response must be filed with the Executive Director and provided by service of
6 process, or by registered or certified mail; with return receipt requested, to all other proposed
7 respondents listed in the probable cause report not later than 21 days following service of the
8 probable cause report.

9 The Commission staff may submit any evidence or argument in rebuttal not later than ~~ten~~
10 10 days following the filing of a response with the Executive Director.

11 The time limitations in this section may be extended by the Executive Director for good
12 cause. At any time prior to a determination of probable cause, the Executive Director may allow
13 additional material to be submitted as part of the initial response or rebuttal.

14 (3) Probable Cause Conference. Any proposed respondent may request that a probable
15 cause conference be held. Such a request shall be served upon the Executive Director and upon
16 all other proposed respondents not later than 21 days after service of the probable cause report
17 unless the time is extended by the Executive Director for good cause. The probable cause
18 conference shall be at a time fixed by the Executive Director and shall be conducted informally.
19 The conference shall be closed to the public unless a proposed respondent requests and all other
20 proposed respondents agree to a public conference. If the conference is not public, only
21 members of the Commission staff, any proposed respondent and his or her legal counsel or
22 representative shall have the right to be present and participate. In the discretion of the

1 Executive Director, witnesses may be allowed to attend and participate in part or all of the
2 probable cause conference. In making this determination, the Executive Director shall consider
3 the relevancy of the witness' proposed testimony, whether the witness has a substantial interest in
4 the proceedings, and whether fairness requires that the witness be allowed to participate.
5 Representatives of any civil or criminal prosecutor with jurisdiction may be present at the
6 conference at the discretion of the Executive Director if they agree to respect the confidential
7 nature of the proceedings. Barring objection by any of the parties and the presiding officer and
8 provided it is not open to the public, the conference may be conducted in whole or in part by
9 telephone.

10 The probable cause conference shall be tape recorded. The Executive Director may make
11 a determination as to probable cause based solely on the probable cause report, any responses or
12 rebuttals filed and any arguments presented at the probable cause conference by the interested
13 parties. If the Executive Director determines that additional information is needed before
14 probable cause can be determined, he or she may permit any party to submit additional evidence
15 at the probable cause conference.

16 (4) Finding of Probable Cause. The Executive Director may find there is probable cause
17 to believe a violation has occurred if the evidence is sufficient to lead a person of ordinary
18 caution and prudence to believe or entertain a strong suspicion that a proposed respondent
19 committed or caused a violation. A finding of probable cause by the Executive Director does not
20 constitute a finding that a violation has actually occurred.

21 The Executive Director shall not make a finding of probable cause if he or she is
22 presented with clear and convincing evidence that, at a time prior to the alleged violation, the

1 violator consulted with the staff of the Commission in good faith, disclosed truthfully all the
2 material facts, and committed the acts complained of either in reliance on the advice of the staff
3 or because of the failure of the staff to provide advice.

4 If the Executive Director makes a finding of probable cause, he or she shall cause an
5 Accusation to be prepared pursuant to Government Code ~~Section~~ section 11503 and shall cause
6 it to be served upon the person or persons who are subjects of the probable cause finding. The
7 finding of probable cause shall be announced publicly by the Executive Director. The
8 announcement shall contain a summary of the allegations and a cautionary statement that the
9 respondent is presumed to be innocent of any violation of the Act unless a violation is proved in
10 a subsequent proceeding. The Chief of the Enforcement Division shall be responsible for
11 insuring the presentation of the case in support of the Accusation at an administrative hearing
12 held pursuant to Government Code ~~Section~~ section 83116.

13 (e) Administrative Hearings.

14 (1) Administrative Hearing Brief. Not later than one week prior to a contested
15 administrative hearing that is to be heard by the Commission itself, the Executive Director shall
16 and any respondent may submit to the Commission a written brief describing the evidence to be
17 presented at the hearing and outlining significant legal arguments expected to be raised. Prior to
18 the contested hearing, when a brief is submitted by any party pursuant to this ~~subsection~~
19 subdivision, a copy shall be provided to all other parties to the administrative action.

20 (2) Preliminary Matters and Hearing on Merits. If the Executive Director determines
21 that a hearing on the merits should be conducted before an administrative law judge alone
22 pursuant to Government Code ~~Section~~ section 11512(a), he or she shall provide a copy of the

1 accusation as well as a memorandum describing the issues involved to each member of the
2 Commission. If, at the next regularly scheduled meeting, two or more Commissioners indicate a
3 desire to participate in the hearing, the matter will be scheduled for a hearing before the
4 Commission when an administrative law judge is available.

5 When the Commission decides to participate in a hearing on the merits, the Chairman of
6 the Commission may decide that any or all motions as to procedural matters, validity or
7 interpretation of the Political Reform Act, disqualification of any member of the Commission, or
8 any other matters not related to the truth or falsity of the factual allegations in the accusation
9 shall be heard by an administrative law judge alone prior to the hearing on the merits. Any such
10 motions or matters shall be noticed in a timely fashion. Any person requesting reconsideration
11 by the Commission of any decision of the administrative law judge shall submit, at least 14 days
12 prior to the hearing on the merits, a written request for reconsideration setting forth the reasons
13 for the request and including any appropriate points and authorities or affidavits.

14 (3) Standard of Proof. When an administrative hearing is conducted under Government
15 Code ~~Section~~ section 83116, findings shall be made on a preponderance of the evidence and it
16 shall require the concurrence of at least three members of the Commission to find a violation or
17 impose any order.

18 (4) Factors to be Considered by the Commission. In framing a proposed order following
19 a finding of a violation pursuant to Government Code ~~Section~~ section 83116, the Commission
20 and the administrative law judge shall consider all the surrounding circumstances including but
21 not limited to:

22 (A) The seriousness of the violation;

1 (B) The presence or absence of any intention to conceal, deceive or mislead;

2 (C) Whether the violation was deliberate, negligent or inadvertent;

3 (D) Whether the violator demonstrated good faith by consulting the Commission staff or
4 any other government agency in a manner not constituting a complete defense under
5 Government Code ~~Section~~ section 83114(b);

6 (E) Whether the violation was isolated or part of a pattern and whether the violator has a
7 prior record of violations of the Political Reform Act or similar laws; and

8 (F) Whether the violator, upon learning of a reporting violation, voluntarily filed
9 amendments to provide full disclosure.

10 (5) Stipulated Orders. At any time before or during an administrative hearing and in lieu
11 of such a hearing, the Executive Director and the person who is the subject of the investigation
12 may stipulate to the entry of an order. The order must be approved by the Commission, which
13 may consider the matter in executive session. The stipulated order shall set forth the pertinent
14 facts and may include an agreement as to anything that could be ordered by the Commission
15 under Government Code ~~Section~~ section 83116. The stipulated order shall be released publicly
16 and shall have the force of an order of the Commission.

17 (f) Prosecutors. The Executive Director may permit any civil or criminal prosecutor,
18 within the meaning of Government Code ~~Sections~~ sections 91001 and 91001.5, to present a case
19 for determination of probable cause under the procedures of this regulation and to present such a
20 case to the Commission at an administrative hearing if probable cause is found. When the
21 Executive Director authorizes such a presentation, he or she may require that the prosecutor
22 prepare the probable cause report described in ~~subsection~~ subdivision (d)(l) of this regulation and

1 present the case at any probable cause conference or administrative hearing that is held.

2 (g) Notwithstanding 2 Cal. ~~Adm. Code Section~~ Code Regs. section 18319:

3 (1) The Executive Director shall have the authority to issue subpoenas on behalf of the
4 Commission pursuant to Government Code ~~Sections~~ sections 83118 and 11510. The Executive
5 Director shall not authorize the issuance of a subpoena duces tecum unless he or she finds, based
6 on information submitted to him or her in writing, that the information requested in the subpoena
7 is material to a specific matter then under investigation, and that there is reason to believe that
8 the person or entity to be subpoenaed has the desired information under their control. The
9 Executive Director may delegate in writing his or her authority under this regulation to issue
10 subpoenas only to the General Counsel or Chief of the Enforcement Division and then only when
11 the Executive Director believes he or she cannot be fair or impartial with respect to a particular
12 matter or when he or she will be away from the offices of the Commission.

13 (2) The Executive Director may delegate in writing any other authority under this
14 regulation only to the General Counsel and then only when the Executive Director believes he or
15 she cannot be fair or impartial with respect to a particular matter or when he or she will be away
16 from the offices of the Commission.

17 (h) Inapplicability of This Regulation to Other Enforcement Procedures. None of the
18 procedures described in this regulation and none of the provisions of Government Code ~~Sections~~
19 sections 83115.5 and 83116 need be followed in connection with the disposition of any
20 enforcement matter other than by way of an administrative hearing conducted pursuant to
21 Government Code ~~Section~~ section 83116.

22 NOTE: Authority cited: Section 83112, Government Code.

23 Reference: Sections 83115, 83115.5 and 83116, Government Code.

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